Supreme Court, U.S.
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No. 97-1943

In The

Supreme Court of the United States

October Term, 1997

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

vs.

UNITED AIR LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is nearsightedness, a minor and commonplace condition totally correctable by the mere use of glasses or contacts, a disability under the Americans with Disabilities Act?

2. Did the Tenth Circuit give appropriate consideration to the Equal Employment Opportunity Commission's interpretive rule that requires disabilities be determined without regard to mitigating measures when the mitigating measures in question are eyeglasses and contacts?

3. Is a person regarded as disabled when she is treated as disqualified from performing only the job of global airline pilot?

CORPORATE LISTING PURSUANT TO SUPREME COURT RULE 29.6

Respondent United Air Lines, Inc. has a parent corporation named UAL Corporation, but does not have any nonwholly owned subsidiaries to report pursuant to Supreme Court Rule 29.6.

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REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT'S DECISION DOES NOT CREATE AN INTER-CIRCUIT CONFLICT.

A. The Tenth Circuit's Decision That Poor Vision Correctable by Eyeglasses is Not a Disability is in Accord with Every Other Circuit Court Which Has Considered This Issue.

The Tenth Circuit decided that a myopic (nearsighted) individual whose vision is *totally* corrected by the use of eyeglasses or contacts is not disabled under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), because he or she is not substantially limited in a major life activity.[1] (Petitioners' Appendix at A-17 to 18.) This decision does not create an inter-circuit conflict. In fact, the decision is supported by every other circuit court that has considered the same issue.[2]

In *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), the Fifth Circuit decided that a person with vision that can be corrected to 20/60

1. A person is disabled under the ADA if he or she has an impairment that substantially limits a major life activity, has a record of such impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2).

2. Two circuit courts have decided that vision impairments which were *not* correctable were disabilties under the ADA. *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) (plaintiff totally blind in one eye); *Kirkingburg v. Albertson's, Inc.*, No. 96-35002, 1998 U.S. App. LEXIS 9439 (9th Cir. May 11, 1998) (plaintiff with vision of 20/200 that could not be corrected). No circuit court has decided that a minor, totally correctable vision problem is a disability.

is not handicapped, as that term is defined by the Rehabilitation Act.[3] More recently, the First Circuit addressed this issue head on:

> the availability of such a simple, inexpensive remedy [eyeglasses or contacts], that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor, trivial impairment[ ]," Senate Report at 23, that would not be considered a disability under the ADA.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 866 n.10 (1998) (distinguishing correctable myopia from diabetes that was controlled by medication (which the court found to be a disability)).

The Seventh Circuit has twice come to the same conclusion. In *Roth v. Lutheran General Hosp.*, 57 F.3d 1446 (1995), a person with strabismus (a condition in which the eyes are not correctly aligned) which was significantly corrected by the use of glasses was found not to be disabled because his impairment was not substantially limiting: plaintiff was a pharmacist and a lawyer and was working his way through medical school. *Id.* at 1455.

> While [plaintiff's] condition is not completely correctable through the use of glasses or other means, [plaintiff] has "adapted well to daily activities and he should have the visual capacity to function well in most medical specialties."

3. Congress intended the term "disabled" to be construed in accordance with the Rehabilitation Act's term "handicapped individual." *Bragdon v. Abbott*, No. 97-156, 1998 U.S. LEXIS 4212, at *14 (June 25, 1998).

Id. See also Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 675 (7th Cir. 1998) ("Not every physical or mental impairment 'counts' for ADA purposes, because most disabilities from which people suffer (*bad vision*, impaired hearing, arthritic joints, diabetes) do not have a substantial enough effect on their major life activities.") (emphasis added).

The Tenth Circuit's decision that correctable myopia is not a disability does not create a conflict among the circuits and a grant of certiorari is not, therefore, appropriate in this case.

B. The Tenth Circuit Correctly Decided This Issue.

Congress did not intend that a minor and relatively common impairment such as nearsightedness (for which there is a simple and inexpensive remedy) be a covered disability. The text of the ADA, as well as its legislative history, mandates this conclusion.

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . . .

42 U.S.C. § 12101(7). This language, drawn from the findings and purposes section of the ADA, simply does not describe the millions of nearsighted Americans with eyeglasses.

Commenting on what were reasonable accommodations for blind and visually-impaired persons, the House Committee on Education and Labor referred to

> adaptive hardware and software for computers, electronic visual aids, braille devices, talking

> calculators, magnifiers, audio recordings and brailled material.

H.R. Rep. No. 485, 101st Cong., 2nd Sess. 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 346. The ADA itself describes auxiliary aids which can assist persons with visual impairments: "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments." 42 U.S.C. § 12102(1)(B). By reference to accommodations such as braille devices and audio recordings, and auxiliary aids such as qualified readers and taped texts, it is clear Congress did not intend to cover easily correctable visual impairments such as nearsightedness.

Second, the Tenth Circuit applied the law correctly. To be deemed disabled under the ADA, the impairment in question must substantially limit a major life activity. 42 U.S.C. § 12102(2)(A). For an impairment to be substantially limiting, the person must be "unable to perform a major life activity that the average person in the general population can perform" or be "significantly restricted *as to the condition, manner or duration* under which [he or she] can perform a particular major life activity as compared to [the average person]." 29 C.F.R. § 1630.2(j)(1) (1997) (emphasis added). It appears to have been assumed by Petitioners that the term "average" equates to "perfect." This is far from true where vision is concerned.[4]

As the Tenth Circuit noted "[p]laintiffs merely don their eye glasses [or contact lenses] and go about all their normal activities in the same or similar [ ] manner [ ] as the average person" and therefore are not disabled. (Petitioners' Appendix

4. For whatever persuasive value the Court deems it to have, the January 26, 1998 *American Optometric Association News* noted that more than half of all Americans (fifty-five percent (55%) or 147 million people) wear glasses or contacts to correct vision problems.

at A-18.) The Tenth Circuit simply and correctly found that a nearsighted person who can easily correct her vision with eyeglasses or contact lenses is not disabled. Any other conclusion would nullify the ADA's requirement that a person is disabled only if he or she is "substantially limited" in major life activities.

Of course, one of the most compelling arguments as to why the Tenth Circuit correctly decided this issue is the Equal Employment Opportunity Commission ("EEOC") Guidance, cited by the Tenth Circuit in its opinion:

> [A]n individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working . . . [and is] not substantially limited in the ability to perform any other major life activity.

29 C.F.R. § 1630, App. § 1630.2(j) (1997).

Correctable myopia is not a substantially limiting impairment and therefore is not a disability — and Congress never intended it to be considered as such. The Tenth Circuit correctly decided this issue.

C. This Case Does Not Provide the Best Vehicle for Resolving the Subsidiary Issue of Whether Disabilities Should be Determined Without Regard To Mitigating Measures.

In coming to its decision that Petitioners' myopia did not constitute a disability, the Tenth Circuit concluded that corrective eyewear (Petitioners' "mitigating measures") *should* be

considered when determining whether a person is disabled under the ADA.[5] (Petitioners' Appendix at A-16.) The Court reasoned that since the ADA requires a person to be substantially limited in a major life activity in order to find her to be disabled, courts should be

> concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

(Petitioners' Appendix at A-16.)

While there is a split of authority among the circuit courts on this subsidiary issue of whether to adopt the EEOC Guidance,[6] *there is no split* when the mitigating measures in question are common, everyday eyeglasses and contacts. Even the circuit courts that have decided to adopt the EEOC Guidance and *not* take mitigating measures into consideration when making disability determinations have not so held when the mitigating measures in question are eyeglasses and contacts. *See, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 n.10 (1st Cir. 1998) (holding that diabetes totally controlled by medication was a disability, but noting that the court would likely not reach the same result if correctable myopia was at

5. The EEOC issued an ADA Guidance stating that whether a person has an impairment, and whether that impairment is substantially limiting, should be determined *without regard* to mitigating measures. 29 C.F.R. § 1630, App. § 1630.2(h), (j) (1997). The Tenth Circuit decision is at odds with the EEOC Guidance in this case.

6. *See, e.g., Arnold*, 136 F.3d at 864-6 (adopting Guidance and evaluating diabetes in its unmedicated state); *Gilday v. Mecosta County*, 124 F.3d 760, 766-67 (6th Cir. 1997) (2-1 decision *rejecting* Guidance and determining that plaintiff with diabetes was not disabled).

issue). Even if the Court was concerned about the general split of authority on this issue, the Court should still deny the petition because the facts presented by this case do not provide the best vehicle for resolution of the mitigating measures question.

The mitigating measures issue arises in a variety of factual contexts, most typically involving the use of medicines (to control diabetes, for example) or medical devices (such as pacemakers and hearing aids).[7] In this case, however, the mitigating measures at issue are eyeglasses (or contacts): Petitioners have perfect vision once they put on their eyeglasses.

Assuming the Tenth Circuit's ultimate decision was correct (that Congress did not intend the ADA to cover the millions of persons in America whose vision is correctable by the use of eyeglasses), then analyzing the mitigating measures issue on these facts poses the following problem for the Court. Either the Court must expand the reach of the ADA beyond what was intended by Congress or the Court must be willing to issue a ruling that will be distinguishable on its facts. In other words, if the Court decides in this case to adopt the EEOC guidance and hold that the use of mitigating measures such as eyeglasses should *not* be considered when making disability determinations, then the door opens to claims involving countless other slight and commonplace conditions that Congress clearly did not intend the ADA to reach.

On the other hand, if the Court upholds the Tenth Circuit's decision that use of mitigating measures such as eyeglasses and contacts *should* be considered in making disability determinations, then the Court will be left with a ruling that

7. *See, e.g., Arnold*, 136 F.3d at 864-6 (diabetes); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 517 (11th Cir. 1996) (Graves disease); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 935 (3rd Cir. 1997) (epilepsy).

will be susceptible to arguments that eyeglasses and contacts (unlike the medicines and medical devices which help control diabetes, heart conditions and other more serious, and often life-threatening illnesses) were simply too commonplace and too diminimus of a remedy for the Court not to take them into consideration.

Hence, the decision would likely be too narrow to be of guidance. There are many other more suitable cases pending in the lower courts at this time that will allow this Court to resolve the mitigating measures question on more illuminating facts. *See, e.g., Baert v. Euclid Beverage Limited*, No. 97-1474, 1998 U.S. App. LEXIS 15293, at *6-7 (7th Cir. July 10, 1998) (diabetes controlled by medication is a disability); *Wright v. City of Tampa*, No. 97-408-CIV-T-17F, 1998 U.S. Dist. LEXIS 4338, at *2 (M.D. Fla. March 26, 1998) (evaluating a blood disorder without regard to corrective medication).

II.

THE TENTH CIRCUIT GAVE APPROPRIATE CONSIDERATION TO THE EEOC'S INTERPRETIVE GUIDANCE ON MITIGATING MEASURES UNDER APPLICABLE SUPREME COURT LAW.

The EEOC's position that disabilities be determined without regard to mitigating measures is not found in the regulations promulgated pursuant to the ADA, but rather in an appendix to the ADA regulations titled "Interpretive Guidance on Title 1 of the Americans with Disabilities Act." 29 C.F.R. § 1630 App. (1997). This guidance constitutes a set of interpretive, rather than legislative, rules not subject to public notice and comment procedures under the Administrative Procedure Act ("APA"). While legislative rules promulgated under the APA (agency regulations, for example) are to be given "controlling weight

unless they are arbitrary, capricious, or manifestly contrary to the statute," *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (giving deference to EPA regulations promulgated under the Clear Air Act),[8] informal interpretive rules like those at issue here are not afforded the same consideration. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

In *Meritor*, this Court stated that the EEOC's interpretive rules governing sexual harassment under Title VII, 'while not controlling upon the courts by reason of their authority, do constitute a body of law to which courts and litigants *may* properly resort for guidance.' " *Id.* (emphasis added); *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 312-316 (1979) ("A court is *not required* to give effect to an interpretive regulation [rules issued without the required procedures of the ADA].") (emphasis added). This Court has been clear: adoption of interpretive rules is permissive rather than mandatory.

The Tenth Circuit's opinion is in accord with this law: the Court acknowledged that the EEOC's Interpretive Guidance may be entitled to some weight or consideration, but correctly noted that it does not carry the force of law and is not entitled to the deference afforded by *Chevron*. (Petitioners' Appendix at A-9, n. 3.) The Tenth Circuit then discussed the Guidance at length and adopted it in part. (Petitioners' Appendix at A-9, A-14 to 15.)[9] Despite Petitioners' argument to the contrary, the Tenth Circuit was not required to do more.

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8. *See also Bragdon v. Abbott*, 1998 U.S. LEXIS 4212 at *38-39 (Justice Department regulations construing public accommodations section of ADA entitled to deference under *Chevron*).

9. The Court adopted the EEOC Guidance on mitigating measures in relation to determining whether a plaintiff had an impairment, but not with regard to determining if that impairment was substantially limiting. (Petitioners' Appendix A-9, A-14 to 15.)

Regardless, the law is clear that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). In this case, the Tenth Circuit ultimately concluded that the

> portion of the EEOC's Interpretive Guidance [requiring that whether an impairment is substantially limiting be determined without regard to mitigating measures] is in direct conflict with the plain language of the ADA.

(Petitioners' Appendix at A-16.) As a result, under the Court's analysis, *no* deference was due to the Guidance.

This issue simply provides no additional basis for certiorari review. There is a plethora of Supreme Court law on the issue of agency deference. The Tenth Circuit correctly applied that law and its opinion in this case does not create an inter-circuit conflict (that some circuit courts afforded more deference to the Guidance than was due under well-established Supreme Court law does not create a split of authority). Petitioners' writ does not warrant a grant of certiorari.

III.

THE TENTH CIRCUIT CORRECTLY APPLIED THE LAW IN CONCLUDING THAT PETITIONERS COULD PRESENT NO SET OF FACTS BASED ON THEIR AMENDED COMPLAINT ESTABLISHING THAT UNITED REGARDED THEM AS DISABLED.

The Tenth Circuit held that Petitioners could present no set of facts based on their Amended Complaint establishing that Respondent United Air Lines, Inc. ("United") regarded them as

having a substantially limiting impairment. (Petitioners' Appendix at A-24.) Petitioners allege that the Tenth Circuit erroneously considered the perceptions of other employers in the industry in reaching this conclusion. Specifically, Petitioners contend that while the Tenth Circuit's decision properly recognized that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters," (Petition at 12), the Tenth Circuit nevertheless failed to apply this rule to the particular facts and circumstances of the case. This is rarely a basis for granting certiorari (*see* Supreme Court Rule 10) and, even if it were, Petitioners' argument fails because the Tenth Circuit correctly applied the law.

Under the third prong of the statutory definition of "disability," a person is disabled if he is regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual. *See* 42 U.S.C. § 12102(2)(C). The limiting adjectives "substantially" and "major" indicate that the perceived "impairment must be a significant one." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Byrne v. Board of Educ., Sch. Dist. Of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992)). A person is "regarded as having" an impairment that substantially limits the person's major life activities when other people *treat* that person as having a substantially limiting impairment. *See* 29 C.F.R. § 1630.2(l) (1997) (emphasis added).

Petitioners alleged that United regarded them as disabled in the major life activity of working. With respect to the major life activity of working, the term "substantially limited" is defined as

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various

> classes as compared to the average person having comparable training, skills and abilities.

29 C.F.R. § 1630.2(j)(3)(i) (1997). Thus, the mere "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*[10] In making this determination, courts may consider:

> (A) the geographical area to which the individual has reasonable access;
>
> (B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs *utilizing similar training, knowledge, skills or abilities, within the geographic area*, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also

10. *See also Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (Feb. 23, 1998) ("[An] employer regards an employee as substantially limited in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.") (citations omitted); *Miller v. City of Springfield*, No. 97-3268, 1998 U.S. App. LEXIS 13385, at *4 (8th Cir. April 17, 1998) ("A finding that a plaintiff is substantially limited in working requires a showing that her overall employment opportunities are limited.") (citations omitted); *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1133 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997) ("An impairment does not substantially limit the ability to work merely because it prevents a person from performing either a particular specialized job or a narrow range of jobs.") (internal citations and quotations omitted).

> disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1997) (emphasis added).

Based on these regulations, the Tenth Circuit properly concluded that for Petitioners to establish they were disabled under the "regarded as" prong of § 12102(2), Petitioners must prove United treated them as being significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. (Petitioners' Appendix at A-21.)

With this in mind, the Tenth Circuit looked to Petitioners' pleadings. As the Tenth Circuit correctly noted, Petitioners' sole contention in this regard is that United disqualified them from the class of jobs of "global airline pilot." (Petitioners' Appendix at A-22.) Taking this pleading as true, the Tenth Circuit found that "this description [global airline pilot] is too narrow to constitute [a] 'class of jobs.' " (Petitioners' Appendix at A-22.)[11] Accordingly, the Tenth Circuit concluded that assuming Petitioners were able to establish that United treated them as disqualified from all global airline pilot positions, this would be insufficient as a matter of law to establish that United regarded them as substantially limited in the major life activity of working. (Petitioners' Appendix at A-24.)

11. As the Tenth Circuit reasoned, the class of jobs that utilize "similar training, knowledge, skills or abilities" would include, but not be limited to, "all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." (Petitioners' Appendix at A-23.)

This holding is supported by decisions from other circuits. In *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), for example, the defendant, Delta Air Lines ("Delta"), filed a motion for summary judgment claiming that the plaintiff could not establish that Delta perceived him as significantly restricted in the ability to perform a "class of jobs." The district court granted Delta's motion and the plaintiff appealed. The Eleventh Circuit affirmed the judgment, finding plaintiff's evidence that Delta perceived him as unable to pilot airplanes for anyone was insufficient to overcome Delta's motion for summary judgment:

> [P]iloting airplanes is too narrow a range of jobs to constitute a "class of jobs" as that term is defined in 29 C.F.R. § 1630.2(j)(3)(ii)(B). . . . There are non-piloting jobs in the Atlanta area which utilize "similar training, knowledge, skills or abilities" as piloting jobs. Such jobs include pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.
>
> . . .
>
> Because [plaintiff] failed to offer any evidence [that Delta regarded him as unable to perform not just the job of being a pilot, but also the non-piloting jobs we have discussed], we conclude that he failed to raise a genuine issue that Delta regarded him as significantly restricted in the major life activity of working.

Id. at 1370; *See also Bridges v. City of Bossier*, 92 F.3d 329, 335-36 (5th Cir. 1996), *cert denied*, 117 S. Ct. 770 (1997) ("[F]irefighting jobs — including firefighters and associated municipal paramedics or EMTs who must also serve as backup firefighters — is too narrow a field to describe a 'class of jobs' under 29 C.F.R. § 1630.2(j)(3)(i).").

Petitioners attempt to avoid this case law by contending that the Tenth Circuit erred in defining the pertinent "class of jobs" to include similar pilot positions with other airlines because, by doing so, the Tenth Circuit imposed "through the back door" the requirement that Petitioners must be regarded as disabled by all employers, not just United. (Petition at 13.) This is simply not true. What the Tenth Circuit did was carefully apply the law mandating that the "class of jobs" include *all* jobs utilizing "similar training, knowledge, skills or abilities." Such "class of jobs" would include similar pilot positions with other airlines, as the Tenth Circuit expressly acknowledged, and all other jobs utilizing "similar training, knowledge, skills or abilities," such as pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer. *See, e.g., Witter*, 138 F.3d at 1370. The Tenth Circuit's analysis is sound and in accord with the other circuit courts that have considered the breadth of the "class of jobs" from which an individual must be regarded as disqualified to be "disabled" under the ADA.

The Tenth Circuit's decision correctly applied the law in holding that Petitioners could present no set of facts based on their Amended Complaint establishing that United perceived them as having a substantially limiting disability. The petition for writ of certiorari should be denied.

CONCLUSION

The Tenth Circuit's decision is well-reasoned and does not create an inter-circuit conflict that should be decided by this Court, or involve a misapplication of the law. A writ of certiorari to review the Tenth Circuit decision is not warranted in this case. Respondent United Air Lines, Inc. respectfully requests that this Court deny Petitioners' writ of certiorari.

Respectfully submitted,

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